IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO 4858 OF 1993

Shri Datta Nagosa Solanki
Occupation Business,
Residing at 693, B. Ward, .. Petitioner
Kolhapur. Orig. Plff.

V/s
Shir Madhukar Dattoba Adnik
since deceased by his heirs
and legla representatives:

1. Smt. Anusaya Madhukar Adnaik
2. Dilip Madhukar Adnaik
3. Shri Mahesh Madhukar Adnaik.

All residents of 694/1/B, Azad Chowk,
Kolhapur.

Mr. V.S. Gokhale i/b Mr. B.P.Apte for the petitioner.
Shri N.V. Bandiwadekar for respondent Nos. 1 to 3.

CORAM : ANOOP V.MOHTA J.

DATE : 21ST JULY, 2005.

ORAL JUDGMENT

. The petitioner-landlord has invoked Article 227 of the Constitution of India and sought to challenge the impugned judgment and order dated 11/1/1993, passed by the Additional District Judge, Kolhapur, (appellate court), whereby, the Judgment and decree passed by the II Jt. Civil Judge, J.D., Kolhapur, (trial court) dated

7/3/1987, was set aside and the matter has been remanded to the trial Court for a fresh trial.

2. Heard the learned Counsel for the parties. The bone of contention in the present matter is revolving around the issue, about fixation of standard rent, as contemplated under section 11(3) r/w section 12(a) and (b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short Bombay Rent Act).

3. The main ground for the suit of eviction was irregular payment. The trial Court, after considering the merits of the matter accepted the case of the landlord. The trial Court, had considered the following observation of the judgments of the Bombay High Court in **1986 Bom. R.C. 316 (Danilal V. Lalji Thakkar).**

> "The empty formality of moving an application for determination of standard rent within one month of the receipt of the demand notice under section 12(2) is not enough. If the Court was under an obligation to forthwith specify the amount payable by the tenant, it could do so, only if it was moved by the tenant. As said earlier, there is no evidence to show that the tenant was in hurry to get the order contemplated by Section 12(3) of the Act. The result is that he was disentitled to the protection under Sec. 12(3)(b) of the Act.

This case falls under Section 12(3)(a)."

4. The learned Counsel appearing for the landlord has also relied on the judgment reported in **1997 (1) Mah. L.J. 289 (Kalandarali Akbarali Kazi V. Shaikh Gulam Ibrahim)** and on the following observations;

> " It is difficult to appreciate that when a tenant does nothing of the sort, there is any obligation cast on the Court to pass any such order without the tenant doing anything."

5. Before going further into the merits of the matter, this aspect basically dealing with the mandate of the provisions of Bombay Rent Act, in so far as, the payment of rent and or ground of default is concerned, need some elaboration. As per the scheme of the Bombay Rent Act, it is mandatory for the tenant to pay the rent regularly, as per the agreement. After the demand notice he get first chance to make the payment and or resist or object the demand made. If a tenant makes the deposit or satisfy the landlord about the payment he would get immediate protection, as contemplated under the Bombay Rent Act. Another remedy is available under the Act is to file an application for fixation of standard rent within 30 days, after receipt of the

demand notice and if he files an application, he is entitled for the protection, as contemplated under the Bombay Rent Act.

6. If there is an order passed by the Court, while fixing ad interim rent, another opportunity is available to the tenant to make the deposit or deposit the rent regularly, as per the order passed by the Court on said application. If there is an irregularity in depositing the rent in spite of the order passed by the Court, and in the given case, the Court may consider the ground of default or irregularity but not otherwise.

7. Therefore, the question is whether it is mandatory for the tenant to move an application and insist for the fixation of the provisional rent or interim rent. Section 11(3) contemplates an application by the tenant, for fixation of standard rent or determining the permitted increases, after receipt of the notice from the landlord under sub-section (2) of Section 12 of the Bombay Rent Act. The other basic aspect which can be borne out from this section itself is the "obligation of the Court to decide such

application." The words "shall, forthwith" put an additional factor, which Court requires to take note of after receipt of such application. Section 12(3) (b) and its explanation, nowhere provides that there should be an separate application to be moved or filed by the tenant for fixation of ad interim or provisional rent. In absence of the specific provisions or even an implied mandate, it is difficult to accept that merely because there was no application filed by the tenant for fixation of standard or provisional rent, would itself amount to breach of provisions of Bombay Rent Act, specially Section 11(3) and or 12(3)(b). In absence of any specific provisions it is difficult to accept the contention raised by the landlord that non filing of such application, and or non insistence of such an application amounts to breach of the provisions and therefore, the tenant is not entitled to get the protection, as contemplated and or as otherwise available under the scheme of the Act.

8. The Bombay High Court in case of **(Moreshwar Narayan Bhadke V. Shashikant Balkrishana Malkar) (1981 Mh.L.J. 540)** has already considered the scheme in this aspect, while interpreting section 11(3) r/w section 12

of the Bombay Rent Act in the following words. The following observations are also very crucial for deciding the issue in question;

> "The application for determination of interim rent is not a sine qua non to attract Explanation 1 of Section 12 of the Rent Act. It is open for a tenant to file the application under sub-section (3) and thereafter to pay or deposit the contractual rent without seeking determination of the interim rent. In such a case, even though interim rent is not fixed, the advantage of explanation is available to the tenant".

9. As per the scheme of the Bombay Rent Act, it is in the interest of the parties i.e. the landlord and the tenant, to see that the matter should be disposed of, as early as, possible and including the fixation of ad interim rent, if necessary pending the final decision on main application. But there is some delay in fixation of such ad interim standard rent, or permitted rent the protection as available to the tenant cannot be taken away.

10. The learned Counsel appearing for the **respondents has strongly relied on the judgment of (Smt. Rahanabai Shaikh Tarid and another V. Laxman Piraji**

Kumbhar) (Writ Petition No. 3846 of 1994) and specially para 7, which is reproduced as under:

> Perusal of the provisions of sub-section 1 of Section 12 of the Act shows that a landlord becomes entitled to recover possession of the demise premises, only in one contingency, namely, if the tenant is not ready and willing to pay the rent. Perusal of the provisions of explanation (I), appearing below Section 12, shows that the moment the tenant makes an application for fixation of the standard rent within one months from the receipt of the notice, a statutory presumption is raised that he is ready and and willing to pay the rent. In the face of this statutory presumption in terms of the provisions of sub section (1) of section 12 of the Act, the landlord would not be entitled to recover possession from the said tenant. Perusal of the sub-section 3 of Section 11 of the Act shows that after tenant makes an application for fixation of the standard rent, the duty cast on the Court to fix the amount of rent and it is only after such an order is made then the duty cast on the tenant to deposit the rent. If there is no order made by the Court, then the tenant is not obliged to deposit any amount of rent.

11. In (Vasantrao Shankarrao Bhosle V. Suhas Ramchandra Apte) (2004 (4) Bom.C.R. 314) Bombay High Court has observed as under;

> The Appellate Court has clearly lost sight of the circumstance that the petitioner had duly moved an application for the determination of the standard rent within a period of one month of the receipt of the notice under section 12(2). No order was passed by the trial Court under section 11(3). Counsel for the respondent fairly stated that on perusing the record and proceedings it does emerge that there was no

> order under section 11(3). The tenant, therefore, continued to have the benefit of the legal fiction in the explanation to section 12 under which he would be deemed to be ready and willing to pay the amount of the standard rent once he had filed an application under section 11(3) within a period of one month of the receipt of the notice under section 12(2) and thereafter paid or tendered the amount specified in the order made by the Court."

To conclude this issue, it is also necessary to reproduce the observations made in **(Bapurao Shantaram Nagpure V. Shri Ramavtar @ Bably Malla)(Writ Petition No. 2101 of 2004)**

> "The above referred provisions of law comprised under Section 12(2) and 11(3) discloses that the landlord is not entitled to institute a suit for eviction unless the same is preceded by a notice issued and served upon a tenant, one month in advance, requiring him to pay the arrears of rent. In case of a dispute regarding quantum of rent, the tenant is entitled to file an application for fixation of the standard rent or for determination of the permitted increases in terms of Section 11(3) of the said Act. Once such an application is filed, it is the duty of the Court to pass an order directing the tenant to deposit certain amount in the Court within the specified time and in case the tenant fails to comply with the requirements under Section 11 (3) of the said Act, the proceeding in terms of Section 11(d) are to be dismissed. In terms of section 12(3)(b) of the Said Act, in case the tenant deposits the entire rent as fixed by the Court at the first date of hearing of the suit within the time specified by the Court, in that case no decree of eviction could be passed against the tenant."

12 The above observations speaks for itself. I am in agreement with above observations. In view of this, in my opinion the filing an application, within prescribed period, as available under the Act itself sufficient to get protection to the tenant from eviction on the ground of defaulter under the Act. Non filing of ad interim or provisional standard rent or permitted increases and insistence of early order on it that itself cannot be the reason to treat as an ground for eviction on the foundation that " tenants are not willing or ready to deposit the rent". However, once there an application filed and Court takes note of this aspect and after considering the merits of the matter passes an order of interim or provisional deposit or rent and if there is irregularity in making this payment and or irregular deposit, in that case, the Court in the facts and circumstances of the case, can consider to grant a decree for eviction on the ground of default. There is an additional reason in such circumstances, that once the Court passes an order of depositing the rent and if parties failed to deposit the rent, inspite of order such tenants are not entitled for the protection under the Bombay Rent Act. 1980 Mh.L.J. 737 (Anant Purshottam Athavale V. Damodar Dattatraya

Bedekar and others). The earlier view of the Bombay High Court, as reproduced in (para 8), was not cited and considered in the Danial (Supra). In the Danial (Supra) the tenant was irregular in depositing the rent or payment of rent, therefore, High Court had rejected/dismissed the tenant's petition. The facts are not similar. In the case in hand the trial Court had refused to extend the protection under the Bombay Rent Act, as there was no ad interim standard rent was got fixed by the tenant. The appellate Court has remanded the matter to decide the same firstly to verify the filing of such an application and to decide accordingly.

13. In Kalandarali (Supra) tenant's petition was dimissed also on the ground of proved case of the bonafide need. There was no such application filed for fixation of rent. Therefore, the said case is also distinguishable. Those observations therefore can be said to be the decision on the issue in question.

14. It need not be observed now in view of the Apex Court's decision, as well as the decision of our Court that once there is a default after Court's order then, the Court has no discretion in such matter and in fact

no alternative but to pass a decree for eviction. Those decisions are ;

(I) **2000 (4) Mh.L.J. (Tarabai Shivlal Pardeshi V. Murlidhar Paraji Devde)** (II) **1980 Mh.L.J. 737 (Anant Purshottam Athavale V. Damodar Dattraya Bedekar and others),**

The observations made in Tarabai (Supra) are reproduced as under;

> "While dealing with the said proposition, this Court in para 11 has unambiguously stated the correct legal position that the application for determination of interim rent is not a sine qua non to attract Explanation 1 of section 12 of the Rent Act."

15. Now in the present case, in view of the above observations and after considering the rival contention, between the parties and as the appellate Court has allowed the appeal and remanded the matter for a fresh trial. I see there is no reason to interfere with the remand order. The above observations in the facts and circumstance of the case, sufficient for the trial Court to consider the case on merit, on the basis of existing record and material available on the record without insisting for such application for fixation of

provisional rent.

16. Apart from the above observations, considering the reasoning given, there is no perversity, as such which need to be interfered with. Therefore, the petition is dismissed. Rule discharged. No order as to cost.

[ANOOP V. MOHTA, J.]